Tree-Free Fiber Co., Limited Liability Company *and* United Paperworkers International Union, AFL–CIO-CLC, and its Locals 57 and 82. Case 1–CA–34278

May 10, 1999

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On November 26, 1997, Administrative Law Judge Bruce D. Rosenstein issued the attached decision. The Respondent and the Charging Party filed exceptions and supporting briefs, and the General Counsel filed cross-exceptions and a brief both in support of his cross-exceptions and in answer to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions and briefs, and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified below, and to adopt the recommended Order as modified.[3]

1. The judge found, and we agree, that the Respondent is a successor to Statler Industries, Inc., with a statutory obligation to bargain with the Union[4] concerning the terms and conditions of employment of its production and maintenance employees. The judge also properly found that the Respondent refused to recognize and bargain with the Union as the employees' collective-bargaining representative, in violation of Section 8(a)(5) and (1).[5]

Our dissenting colleague concludes that the Respondent is not a successor employer for collective-bargaining purposes. He would find that there is no "substantial continuity" between the predecessor's operation and that of the Respondent, because of a hiatus of 16 months between the predecessor's shutdown of the plant and the Respondent's startup, and because he perceives that the Respondent's operation is both smaller and significantly different in character from the predecessor's. We agree with the judge's findings of substantial continuity, as fully detailed in his decision and bolstered by the following points of clarification.

The Supreme Court has made it quite clear that the "substantial continuity" analysis in successor cases is to be taken primarily from the perspective of the employees, i.e., "whether 'those employees who have been retained will understandably view their job situations as essentially unaltered.'" *Fall River Dyeing,* supra, 482 U.S. at 43, quoting, *Golden State Bottling Co. v. NLRB,* 414 U.S. 168, 184 (1973).

On the hiatus question, our colleague relies primarily on *Citisteel USA v. NLRB,* 53 F.3d 350 (D.C. Cir. 1995), a case in which the court found that a hiatus of 2 years, together with its finding that the jobs, working conditions, production processes, and customer base differed significantly from the predecessor employer to the asserted successor employer, resulted in an inadequate continuity of operations between the predecessor and the asserted successor. In the instant case, as the judge found, the Respondent continued to make jumbo rolls of paper on the same paper machine in the same manner and for a number of the same customers as the predecessor. Moreover, from the employees' viewpoint, whether the hiatus consisted of 16 months "is somewhat less than certain." *Fall River,* supra at 45. Thus, throughout the shutdown period, the predecessor employed a skeleton crew for maintenance of the plant; the crew included unit employees of the predecessor. Compare id. Further, from the time of the shutdown until August 1995 the predecessor and the Union engaged in collective bargaining, unsuccessfully seeking to reach accommodations that might

[2] The General Counsel and the Respondent have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We will modify the judge's recommended Order in accordance with our decision in *Excel Container, Inc.,* 325 NLRB 14 (1997).

[4] "The Union" herein refers collectively to the United Paperworkers International Union and to its Locals 57 and 82. The General Counsel has excepted to the judge's failure to find, in part II,B,2(a) of his decision, that the International and the Locals are joint bargaining representatives. This omission appears to be an inadvertent error in light of other references in his decision suggesting their joint bargaining status—for example, in his recommended remedial order to bargain. In any event, the judge's factual analysis of the relationship between the International and the two Locals with regard to the representation of the predecessor's bargaining unit employees establishes that they are joint collective-bargaining representatives. See *BASF-Wyandotte Corp.,* 276 NLRB 498, 504–505 (1985).

This finding of joint status has no effect on the validity of the Union's May 8, 1996 request to bargain. Thus, although the written request identified only the International as the representative of the Respondent's employees, it was signed by the president of Local 57 as well as the International's representative. Moreover, it is settled law that one of the labor organizations sharing joint representation rights may act on behalf of the others. See, e.g., *Suburban Newspaper Publications,* 230 NLRB 1215 fn. 4 (1977). Finally, if the Respondent perceived any ambiguity in the request to bargain, it was obliged to seek clarification. *Parkview Manor,* 321 NLRB 477 fn. 2 (1996). The Respondent requested no such clarification in this case.

[5] The judge concluded that May 8, 1996, the date of the Union's written request to bargain discussed above, coincided with the point at which a substantial and representative complement of the Respondent's employees was employed, the point at which the Respondent's bargaining obligation attached, and the point at which the Respondent violated the Act by refusing to bargain. However, it is undisputed that the Respondent did not receive the Union's request until May 31, and did not reply until June 11. The General Counsel contends, and we agree, that a substantial and representative complement was achieved by June 10, the date the Respondent started production. We find that the Union's request to bargain was a "continuing" one, that the Respondent's statutory bargaining obligation arose on June 10, and that the Respondent violated Sec. 8(a)(5) and (1) on June 11, when it rejected the Union's request to bargain. See, e.g., *Fall River Dyeing Corp. v. NLRB,* 482 U.S. 27, 52–53 (1987) (upholding Board's "continuing demand" rule).

facilitate the reopening of the plant. In addition, the predecessor, while in bankruptcy, unsuccessfully transacted to sell the plant in October 1995, and then completed a sale, with the bankruptcy court's approval, to the Respondent in April 1996. The Union was fully aware of these sale negotiations through its participation in the bankruptcy proceeding. Compare id. Accordingly, the predecessor's employees understandably would have sustained an expectation for a reopening of the plant throughout the 16-month shutdown period. "Viewed from the employees' perspective, therefore," id., the hiatus may well have been far shorter than 16 months, and lacking any significance in the substantial-continuity analysis.

Our colleague also views the Respondent's operation as smaller and different in character from the predecessor's. The Board has recently affirmed that a successor employer's bargaining obligation is not defeated simply because a mere portion of the predecessor's operation has been restarted, so long as the successor's employees at issue constitute an appropriate unit and a majority of those unit employees were employees of the predecessor. *Bronx Health Plan,* 326 NLRB 810, 812 (1998), *M. S. Management Associates, Inc.,* 325 NLRB 1154, 1155 (1998). In the instant case, it is undisputed that the Respondent's production and maintenance employees are an appropriate unit for bargaining, and that a majority of them were employees of the predecessor. Therefore, the fact that the Respondent's operation employs 50 employees, where the predecessor's employed 500, is not significant in itself.

We also do not agree with our colleague that the Respondent's operation is significantly different in character from the predecessor's. Essential to the predecessor's production of finished paper products was its production of jumbo rolls of tissue paper, because, quite simply, that is where the finished products came from. The predecessor employees hired by the Respondent produced jumbo rolls for the predecessor. They do the same work for the Respondent in substantially the same way as they did for the predecessor. *From their viewpoint,* the Respondent's operation, their role in the operation, and the Union's prospective role as their collective-bargaining representative is unchanged from that of the predecessor.[6]

2. In addition, the judge concluded that the Respondent's employees working in the classification of "team leader" (TL) must be excluded from the appropriate bargaining unit because they are supervisors within the meaning of Section 2(11). He based this conclusion on his findings that the TLs possess statutory authority over unit employees concerning hiring, discipline, approval of time off, authorization of overtime, and assignment of work. He relied primarily on the testimony of Reiko Bennett, the Respondent's human resources manager and chief witness on this issue. In light of the exceptions of the General Counsel and the Union, the question before us is whether, on review of all of the credited evidence, the Respondent has met the burden of proving that the TLs are statutory supervisors. As explained below, we conclude that it has not, and we will reverse the judge's determination and include the TLs in the bargaining unit.

Section 2(11) defines a "supervisor" as:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a routine or clerical nature, but requires the use of independent judgment.

The statutory definition is set forth in the disjunctive; thus possession of any one of the listed indicia of authority is sufficient to find the individual at issue a supervisor. See, e.g., *Providence Hospital,* 320 NLRB 717, 725 (1996), affd. sub nom. *Providence Alaska Medical Center v. NLRB,* 121 F.3d 548 (9th Cir. 1997). At the same time, the Board is careful not to give too broad an interpretation to this definition because supervisory status results in the exclusion of the individual from the protections of the Act. See, e.g., *Northcrest Nursing Home,* 313 NLRB 491 (1993). The burden of proving supervisory status is on the party asserting that such status exists. Id. at 496 fn. 26.

The Respondent produces jumbo rolls of tissue paper for sale to companies which convert the paper into various consumer products, for example, napkins and paper towels. In starting its operation in June 1996, the Respondent emphasized a "team" production concept, i.e., small, self-directed work teams headed by a TL. The Respondent trains its TLs in "team-building" leadership theories. There were about 10 TLs employed at the time of the hearing. It is apparent that the Respondent utilizes them in three of its departments: the yard department, which, for the most part, handles plant maintenance; the pulp preparation department; and the paper machine department, which is by far the largest of the three. Each TL works side-by-side with the members of the team, carrying out production or maintenance duties in addition to a leadership role on the team. According to the judge, the TL's leadership role includes the possession of several indicia of supervisory authority. We will address each of these indicia individually.

[6] Regarding our colleague's reliance on *Nova Services Co.,* 213 NLRB 95 (1974), we note that the Board has recently questioned the continued viability of that decision. See *Bronx Health Plan* supra, at 812, *M. S. Management,* supra at1155. In any event, as in those cases, we find *Nova* distinguishable since, in that case, unlike here, there was an "inappropriate 'fragmentation' of a previously homogeneous grouping of employees."

Hiring

Human Resources Manager Bennett reviews each employment application and circulates it for review by the other three members of the Respondent's "core hiring team," who, like Bennett, are all undisputed management representatives. If the core team agrees, the applicant is interviewed. The core team conducts the initial interview and then evaluates the candidate. If the applicant is rejected, the process is over. If the core team recommends employment, the applicant proceeds to the next level.

If a position in the paper machine department is at issue, the candidate is interviewed by all of the TLs in the department. A group opinion of the applicant is relayed to the core team by the TLs informally, apparently without documentation. Typically, the TLs simply state either "yes" or "no" on the question whether to hire. There is no specific evidence concerning the employment factors guiding the TL's evaluation of the applicant. There has been no instance where the core hiring team has disagreed with the recommendation of the paper machine department TLs. More specifically, there have been at least two instances where the TLs recommended rejection of an applicant and that person was not hired, without further evaluation by the members of the core team or any other management official.

On the evidence above, the judge concluded that the Respondent's TLs make effective recommendations regarding hiring decisions, a statutory supervisory authority. We do not agree. It is undisputed that the paper machine department TLs do not even consider an applicant until that person has passed two levels of evaluation by the core hiring team—the review of the application and the initial interview—and has been recommended for hire. At either evaluative stage, the core team may reject a candidate, terminating the process. It is beyond debate that the core team weighs an applicant's essential, objective qualifications for employment. Significantly, the Respondent has not explained the specific purpose of the TLs' participation in the process. But, given the Respondent's corporate emphasis on the "team production" concept, it appears that when an applicant is presented to the paper machine department TLs, their evaluative role is limited to whether the candidate is compatible with the existing team members in the department. Thus, Mill Manager Robert Jackson testified that management would "turn that applicant over to the team leaders *and the group of people that were working in the paper room* to find out whether or not they thought that they would make a good employee to work on their teams." (Emphasis added.) However, compatibility recommendations by team leaders—or team members—are insufficient to support a finding of hiring authority within the meaning of Section 2(11). *Anamag,* 284 NLRB 621, 623 (1987). Accord: *Greenspan, D.D.S., P.C.,* 318 NLRB 70, 76–77 (1995), enfd. mem. 101 F.3d 107 (2d Cir. 1996), cert. denied 519 U.S. 817 (1996) (decisions on transfers). Accordingly, we find that the Respondent has not shown that the TLs exercise any "supervisory" authority in the hiring process.[7]

Discipline

According to Bennett's credited testimony, the Respondent has two types of documented disciplinary warnings. The first is a verbal warning, which a TL may issue. The TL notes the issuance of a verbal warning in the employee's record on a standard form which is signed by the human resources manager after the fact. A written reprimand is the second-level disciplinary warning. This document, again based on a standard form, is approved and signed by the human resources manager prior to being issued to the employee. The record does not make clear who initiates and/or drafts this written reprimand. The Respondent did not submit into evidence any examples of either of these two disciplinary forms. However, there is apparently a variation of the written reprimand described above. It is drafted and signed by the human resources manager, then delivered to the employee by the TL. There are three of these reprimands in evidence, as more fully described below.

Bennett described the Respondent's disciplinary procedure in some detail. Essentially, when an employee causes a disciplinary problem, the TL, prior to the issuance of any warnings, consults with Bennett, or with another management official who will refer the TL to Bennett. Bennett discusses the problem with the TL and "coaches" him regarding what he must do to resolve the problem. A decision on the type of discipline to be imposed results from a "consensus" between Bennett and the TL, but Bennett did not elaborate on the nature of this "consensus" determination. Once the TL and Bennett have established a plan, disciplinary action against the employee at issue is carried out.

Bennett recounted her experiences with TL Ted Danforth concerning employees Jeffrey Deschaine and Benjamin Sack as examples of how the disciplinary procedure works. Both employees worked on Danforth's team. At about the same time, it was brought to Bennett's attention that each of the employees was creating a morale problem on the team, due to poor work attitudes, performance deficiencies, and safety issues. In discussing the situation with Danforth, Bennett coached him to begin counseling the employees about their conduct and to begin issuing verbal warnings with documentation in their records.

[7] Bennett's credited testimony on the hiring issue was limited to the paper machine department TLs' role in the process. The record elsewhere indicates, without detail, that the pulp preparation and yard department TLs are consulted and offer their opinions concerning applicants for hire in their respective departments. Absent evidence in the record to the contrary, we assume that the hiring process outside the paper room department is the same and that the TLs' role is also the same.

When matters did not improve, Bennett had another discussion with Danforth. Danforth concurred in the recommendation that the probationary periods of each employee be extended by 90 days as an additional warning. Bennett drafted two reprimands, each one summarizing the basis for the warning, signed them, and gave them to Danforth, who delivered them to Deschaine and Sack. Both of these documents are in evidence.

Deschaine resigned his employment soon after receiving this warning. Sack's disciplinary problems continued. Eventually, Bennett drafted a "final warning" reprimand—which noted that any further policy violation would be cause for discharge—signed it, and gave it to Danforth for delivery to Sack. This document is also in the record. When Sack's situation did not improve, Bennett had another discussion with Danforth, because, as she testified, "a decision needed to be made." Danforth noted that Sack had asked him informally if he might transfer to another department. Danforth recommended against this transfer because it would set a poor example for the other team members. Sack was not transferred; he was terminated soon thereafter.

The judge determined that, in matters of discipline, the TLs exercise independent judgment in preparing and issuing written warnings, and make effective recommendations concerning employee discipline, thus, demonstrating supervisory authority. We conclude, again in disagreement with the judge, that the Respondent has not provided sufficient evidence to show that the TLs possess disciplinary authority under Section 2(11). Without question, an individual who can discipline employees or effectively recommend their discipline is a statutory supervisor. See, e.g., *Northcrest Nursing Home,* supra, 313 NLRB at 497, and cases cited there. Critical to this analysis, as with all of the Section 2(11) indicia, is the question of the individual's exercise of independent judgment.

The evidence establishes that Bennett, the human resources manager, is involved in every disciplinary situation ab initio, prior to the implementation of any disciplinary sanction. She discusses the situation with the TL and coaches him toward an appropriate resolution of the problem. The type of disciplinary action chosen is the result of a "consensus" between Bennett and the TL, but Bennett did not specify what the TL contributes to this decision. Should the disciplinary situation worsen, she takes an even more active role, drafting written reprimands herself for delivery to the employee by the TL.

Given that Bennett closely manages every disciplinary situation to its conclusion, it is not reasonable to find, without more evidence, that TLs exercise independent judgment in their participation in the process. For example, although it is plain on this record that TLs issue documented verbal warnings to employees, they do not initiate such warnings without a "green light" from Bennett. Since there is no evidence, documentary or testimonial, describing any specific incident in which a TL issued a verbal warning, we cannot gauge the use of a TL's independent judgment in these circumstances. It is at least as likely on this record that a TL simply follows Bennett's instructions in each instance, rather than exercising discretion. Similarly, with respect to disciplinary recommendations, we cannot find, without more evidence concerning specific instances, that any such recommendation was implemented without additional discretionary action by Bennett. Rather, the evidence indicates that, at best, disciplinary decisions are reached by "consensus," not pursuant to the recommendation of a TL. Therefore, on this record, we conclude that the Respondent has not satisfied its burden of proving that TLs possess supervisory authority in matters of discipline.[8]

Time Off

Each TL reviews and signs the timesheets of the employees on his team—a simple, clerical matter of timekeeping on this record. Danforth testified that, pursuant to company policy, he approves paid time off during the workday for employees who are sick or have a doctor's appointment. He cannot, however, authorize the use of sick leave or vacation time. We disagree with the judge that Danforth's approval of time off demonstrates supervisory authority, in the absence of evidence that it involves the exercise of independent judgment. Rather, we find on this record that it is simply part of the TL's routine timekeeping function.

Claude Richard, a TL in the yard department, testified that on two occasions he decided to permit employees to go home early, with pay—once to reward an employee for good performance, and the other time to allow an employee to meet a visiting relative. Arguably, these may be examples of the exercise of independent judgment by Richard. However, Richard also testified that he had not been specifically authorized by the Company to grant time off at his discretion. He indicated that he acted on his own, consistent with his understanding of a company policy which he did not identify.

When an individual has not been notified, orally or in writing, that he is vested with a supervisory power, the frequency of exercise of the authority is relevant to a determination of whether in fact the authority has been delegated to him by management. *Greenspan, D.D.S., P.C.,* supra, 318 NLRB at 76. In the instant situation, Richard granted time off only twice. There is no evi-

[8] There is some sparsely-detailed evidence involving two disciplinary recommendations made by TLs against employee Joseph Gitto. Thus, at one point, Danforth recommended to Supervisor Ken Newman that Gitto be given 3 days off for a safety violation. At another time, Danforth and another TL recommended to Bennett that Gitto not be discharged. These recommendations were ultimately followed. As with the evidence discussed above, these instances are not sufficiently detailed to establish that the recommendations were the product of independent judgment, or that they were followed without independent discretionary action by management.

dence that any other TL has acted similarly. Human Resources Manager Bennett, the Respondent's primary witness in support of the supervisory status of the TLs, did not address this issue at all. The Respondent provided no other evidence to confirm that the TLs have this authority. Thus, from the record evidence there exists a strong possibility that Richard's conduct represented an unauthorized extension of his timekeeping responsibility. Accordingly, we conclude that the Respondent has not established that Richard's grants of paid time off were based on a legitimate delegation of managerial authority.

Assignment of Work; Scheduling of Overtime

The judge found that TL Richard has authority to assign and prioritize work for his yard department team. Richard testified that he assigns work to his team members. He further testified that he must respond to requests from other departments in the Company for his team's services—that he must decide, for example, when the grass and bushes will be cut, when the trees will be trimmed, and when rooms will be swept. This evidence, without more, does not establish that Richard's decision-making is marked by independent judgment. His decisions are routine responses to predictable, recurring work-assignment issues. See *Clark Machine Corp.,* 308 NLRB 555 (1992). Accordingly, the evidence does not establish supervisory authority.

The judge found that the TL in the pulp preparation department independently schedules overtime for members of his team. The Respondent's mill manager, Robert Jackson, testified that the pulp prep team occasionally works overtime on 1 weekend day, and that it is the TL's decision which day to work—Saturday or Sunday—and what amount of overtime work will be required. Again, this general, conclusory evidence, without specific evidence establishing that the TL in fact exercises independent judgment in making overtime assignments, does not establish supervisory authority. See *Chevron Shipping Co.,* 317 NLRB 379, 381 fn. 6 (1995*); St. Francis Medical Center-West,* 323 NLRB 1046, 1047 (1997).

For these reasons, we find that the Respondent has not met the burden of proving that the TLs possess any of the supervisory indicia set forth in Section 2(11). Therefore, we conclude that the TLs are "employees" within the meaning of Section 2(3), and that they have a sufficient community of interest to require their inclusion in the production and maintenance unit deemed appropriate for collective bargaining in this proceeding.

ORDER

The National Labor Relations Board adopts the recommended order of the administrative law judge as modified below and orders that the Respondent, Tree-Free Fiber Co., Limited Liability Company, Augusta, Maine, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

In paragraph 2(b), delete the date "June 26, 1996" and insert "June 11, 1996" in its place.

MEMBER HURTGEN, dissenting.

Contrary to the judge and my colleagues, I find that the Respondent is not a Burns[1] successor to Statler Industries. Accordingly, I find that the Respondent did not violate Section 8(a)(5) and (1) of the Act by refusing to recognize the Union as the exclusive representative of its production and maintenance employees.

Under the "successorship" doctrine, an employer that takes over the operations and employees of a predecessor employer is required to recognize and bargain with the union representing the predecessor's employees only where: (1) there is substantial continuity between the predecessor's and the employer's operations; and (2) a majority of the new employer's employees, in an appropriate unit, consist of the predecessor's employees. *Burns*, supra; *Fall River Dyeing Corp. v. NLRB,* 482 U.S. 27(1987). In determining whether successorship has been established, the key inquiry is whether, as a result of the transitional changes between the predecessor and the new employer, it reasonably may be presumed that the employees of the new employer desire the same union representation. See, e.g., *Mondavi Foods,* 235 NLRB 1080, 1082 (1978).

Applying this analysis, I find that the Respondent is not a *Burns* successor. There is no substantial continuity of the employing enterprise that would justify a finding of successorship.[2] Although a number of factors weigh against a finding of substantial continuity, I rely, in particular, on two factors.[3] First, there was a 16-month hiatus between the predecessor's closing of its operation and the Respondent's resumption of a very limited portion of that operation. Second, the Respondent's operation was substantially smaller and different in character from that of the predecessor.

As fully recounted by the judge, Statler Industries closed its operation on February 19, 1995. Thereafter, Statler filed a Chapter 11 bankruptcy petition. On February 23, 1996, the Bankruptcy Court approved the sale of Statler's mill to the Respondent and the sale became final on April 10. The Respondent began hiring employees in April but it did not resume production until about June 10. This lengthy hiatus strongly militates against a finding of continuity. Statler had been closed for over a

[1] *NLRB v. Burns Security Services,* 406 U.S. 272 (1972).

[2] The Respondent concedes that, at times material, a majority of its unit employees were former unit employees of the predecessor.

[3] As the judge acknowledged, the Respondent's personnel policies and work procedures had a number of differences from those of the predecessor. In particular, the Respondent instituted a concept of self directed work teams headed by a team leader. Contrary to my colleagues, and for the reasons given by the judge, I agree with the judge that the Respondent's team leaders were statutory supervisors. However, regardless of the status of the team leaders, it is clear that Respondent's team approach represented a significant change from the work procedures of the predecessor.

year when Respondent purchased the mill. It was still later when Respondent resumed operations. In these circumstances, employees would reasonably view Respondent as a new operation rather than a continuation of the old Statler operation.[4] This in turn would reasonably have an impact on their views on representation.

Further, when Statler closed, it laid off most of its 500 employees. As noted, the Respondent began hiring employees in April 1996 and resumed operations in June. The Union demanded recognition in May 1996.[5] When Respondent actually resumed production on June 10, it had about 50 employees. Thus, its operation was about 10 percent of the size of the predecessor.

My colleagues argue that, during the hiatus, employees would have reasonably maintained expectations that the plant would reopen. I disagree. In this regard, my colleagues point to a skeleton crew during the hiatus; collective bargaining with the Union to reach accommodations that would permit a reopening; and negotiations for a sale. None of these factors would give rise to reasonable expectations that the plant would reopen. Indeed, the lack of success in collective bargaining, and the lack of initial success with respect to negotiations to sell, would point the other way. Finally, even if there were reasonable expectations of a reopening, there was no reasonable expectation that the facility would remain unchanged or that all of the predecessor's employees would be hired. And, as discussed above, neither of these events came to pass.

With its reduced size, Respondent undertook only one portion of the predecessor's multifaceted operation. As described by the judge, Respondent produced only jumbo rolls of paper. Statler produced a wide array of finished products. Further, Respondent sold only to other manufacturers who made a finished product. Statler sold finished products to retailers. For the same reason, Respondent sold off a substantial amount of Statler's equipment. Further, with its reduced size and different operation, the Respondent had a smaller list of customers than Statler.

My colleagues do not view the Respondent's operation to be significantly different from that of the predecessor. I disagree. In my judgment, Respondent's operation, limited to producing jumbo roles, was far different from the predecessor's varied operation. Employees would recognize the significant differences.

In my dissents in *Bronx Health Plan,* 326 NLRB 810 (1998), and *M. S. Management Associates, Inc.,* 325 NLRB 1154 (1998), I set forth why the size of the new employer's unit—relative to that of the predecessor's unit—is an important factor in assessing successorship status. When a new employer hires only a small portion of former employees, that may well be an indication of more than a mere change in magnitude. Rather, as here, this change reflects modification of the character of the business. As noted above, the Respondent's operation is limited to manufacturing jumbo rolls of paper. It does not produce the several finished consumer products manufactured by Statler. Thus, it is not only much smaller than Statler but it is also a different sort of operation. In these circumstances, as in *Nova Services Co.,* 213 NLRB 95, 97 (1974), the new employer's substantially diminished unit is essentially "too fragmentary a basis upon which to predicate a finding of legal successorship."

Ultimately, I find that the facts of this case are more compelling against a finding of successorship than in either *Bronx Health Plan* or in *M. S. Management,* supra. In those cases, there was no hiatus in operations. Here, we have both a substantial hiatus and a new employer whose operation is much smaller and of a different character than its predecessor. In these circumstances, I would not presume that employees' desires in regard to union representation remain as they were under the predecessor. I find that the Respondent was not a successor to Statler. I would let these employees decide for themselves whether they wish to be represented by the Union.

Robert DeBonis, Esq. and *John E. Arbab, Esq.,* for the General Counsel.

Charles S. Einsiedler Jr., Esq., of Portland, Maine, for the Respondent-Employer.

Jonathan S. R. Beal, Esq., of Portland, Maine, for the Charging Party.

DECISION

STATEMENT OF THE CASE

BRUCE D. ROSENSTEIN, Administrative Law Judge. This case was tried before me at Augusta, Maine, on July 21, 22, 23, and 24, 1997, pursuant to an amended complaint issued by the Regional Director of the National Labor Relations Board (the Board) for Region 1 on April 4, 1997, and which is based upon an original and amended charge filed by United Paperworkers International Union, AFL–CIO–CLC, and its Locals 57 and 82 (the Union) on June 26, 1996,[1] and March 27, 1997. The complaint alleges that Tree-Free Fiber Co., Limited Liability Company (the Respondent) has engaged in certain violations of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act).

Issues

(1) Whether Respondent is a successor to Statler Industries, Inc. (Statler) with respect to the facilities acquired by Respondent from Statler.

[4] In *Citisteel USA v. NLRB,* 53 F.3d 350 (D.C. Cir. 1995), the court, in disagreeing with the Board's finding of successorship, stated, "The occurrence of a lengthy hiatus may well weigh against the reimposition of a bargaining obligation when operations are set to resume," citing *Food & Commercial Workers Local 152 v. NLRB,* 768 F.2d 1463, 1472 (1985).

[5] The Union apparently sent its demand on May 8 but Respondent did not receive it until May 31.

[1] All dates are in 1996 unless otherwise indicated.

(2) If Respondent is a successor to Statler, whether Respondent unlawfully failed to negotiate and bargain with the Union as the exclusive collective-bargaining representative of unit employees who had formerly been employed by Statler at those facilities and who had formerly been represented by the Union while working for Statler.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and to cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and the Respondent.

On the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation engaged in the manufacture and recycling of tissue paper, with an office and place of business in Augusta, Maine, where in conducting its business operations, it annually sold and shipped goods valued in excess of $50,000 directly to points outside the State of Maine. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

1. Background on Statler and Respondent

a. Statler

Statler operated a paper mill from 1968 to February 19, 1995, when it closed the mill and laid off the majority of its employees. Throughout this period it was party to a series of collective-bargaining agreements (CBA) with the Union. After the shutdown, from April to August 1995, the parties attempted to negotiate a more "streamlined version" of the CBA. The negotiations were unsuccessful and the lead negotiators for the Union and Statler abandoned the process.

Statler was in the business of manufacturing consumer paper products and principally made napkins, facial tissue, toilet paper, and paper towels. Most of their sales were made to private labels that were sold in grocery stores for purchase directly by the consumer. Statler operated three paper machines that produced 40-inch jumbo rolls of paper, the majority of which were sent to the converting section that made the above noted consumer products. A small percentage of the jumbo rolls were not converted to consumer products and were sold directly to independent outside converters.

On or about March 20, 1995, Statler filed a Chapter 11 bankruptcy petition.[2] On February 23, the Bankruptcy Court approved the sale of the mill to Respondent and it became final on April 10.[3] Thus, there was approximately a year hiatus from the shutdown of Statler until Respondent began operations.

[2] The Union settled its claims in the bankruptcy proceeding for $2,030,000, and Statler employees received severance payments based on their length of service.

[3] Par. 7 of the sale agreement states in pertinent part that: "By acquiring the Assets, Tree-Free shall not be deemed to be a successor in interest to the Debtor, nor shall Tree-Free be deemed to assume any liabilities or obligations of the Debtor." (R. Exh. 4.)

b. Respondent

On April 10, Respondent purchased the assets of Statler for $10 million that included the land, buildings, 3 paper machines, and 11 lines of converting equipment.[4] When Respondent acquired the site, the original plan was to build a brand new $80 to $100 million deinking pulp facility. The business plan also called for operating one of the paper machines to produce jumbo rolls of paper to be sold directly to outside converters. Respondent did not intend to convert the jumbo rolls of paper into consumer products as did Statler. It was anticipated that Respondent could operate the paper machine while they were gearing up to build the new pulp facility with a positive cash flow. The business plan changed, however, as the worldwide price of pulp dropped dramatically and the decision to build the pulp facility was put on hold. Thus, it was decided to proceed with the production of jumbo rolls of paper and a capital investment of $2.3 million was committed to upgrade paper machine 3 and to improve the physical structure of the mill. To assist in raising this capital, Respondent sold Statler's converting equipment for $2 million and derived additional funds from the salvage of paper machine 1, after removing usable parts to support the possible reactivating of paper machine 2.

2. Respondent's officers and supervisory team

Samuel Posner, Respondent's president and a primary investor, was instrumental in completing the purchase of Statler. In March 1996, before the final purchase was approved by the Bankruptcy Court, Posner met with former Statler Paper Mill Manager Bob Jackson, Chief Engineer Brad Snow, and Plant Controller Bill Perry. Shortly after this meeting, each of these individuals was hired to commence employment with Respondent on April 11, in the supervisory positions of mill manager, manager of pulp prep, and corporate controller.[5] Likewise, Richard McElhaney, the former waste treatment plant superintendent at Statler was hired on April 11, as Respondent's director of environmental services and Kenneth Newman, a former Statler forman was also hired on April 11. Newman, an admitted statutory supervisor, schedules the production on paper machine 3, and purchases chemicals and materials for Respondent.

3. The team leader positions

From the inception of its operation, Respondent consistently emphasized that it was a different company then Statler. As part of this process, it adopted the concept of self-directed work teams headed by a team leader. The team leader is responsible for making sure the crew works safely, fills out accident re-

[4] Respondent's operating agreement shows that Statler President Len Sugarman invested $50,000 in the purchase price with an option to invest an additional $150,000. Although Sugarman did not avail himself of this investment opportunity, he was employed by Respondent until September 1996, when he left to pursue other interests. During this period, Sugarman was paid a salary and reimbursed for expenses. Likewise, Paul Sugarman, the chief financial officer of Statler, was employed in the same capacity at Respondent until August 1996. During his tenure, he was authorized to deposit and withdraw money from Respondent's bank account. Neither of the Sugarman's had any direct responsibilities in the day-to-day operations of Respondent.

[5] Snow and Perry continued as statutory supervisors until September 11 and December 10, when they ended their employment with Respondent.

ports, and must report any equipment failures. For approximately the first year of mill operation (June 1996 to May 1997), each work team assigned to paper machine 3 was composed of six individuals. The positions for each work team are comprised of the team leader, back tender, winder operator, assistant winder operator, utility operator, and oiler stock handler. In approximately May 1997, the oiler stock handler position was eliminated and since that time paper machine 3 is operated with five individuals.

The Respondent opines that the team leader positions possess supervisory indicia while the General Counsel and the Union dispute this assertion. An analysis of this issue will be addressed later in the decision.

4. Statler employees

On February 19, 1995, Statler ceased production and laid off the majority of its 500 production employees. Since the insurance companies required a physical presence on the property, a number of employees were retained on the Statler payroll after February 1995. For example, Statutory Supervisors Snow, Perry, and McElhaney continued their employment through 1995 and early 1996 until they were hired by Respondent on April 11, and employee Claude Richard was retained throughout the same period because of his knowledge of the Statler sprinkler systems. He was hired by Respondent on April 11, as a team leader in the yard department.

The job classifications for paper machine 3 at Statler included the machine tender, back tender, third, fourth, and fifth end, and the stock handler oiler position. According to Respondent's team leader, Ted Danforth, who held the position of machine tender at Statler, the job descriptions at Respondent primarily follow the job descriptions at Statler with the duties of those positions being quite similar. While some additional duties were assumed by Respondent employees in the team leader and back tender positions, including quality control and taking care of minor maintenance problems, the responsibilities and duties are substantially similar and during the period from June 10 to May 1997, Respondent produced 40-inch jumbo rolls of paper as did Statler with the same complement of six employees operating paper machine 3.

Pursuant to the CBA, Statler employees enjoyed health and life insurance and were enrolled in a pension plan. Respondent's employees have their fringe benefits specified in the Associate handbook (R. Exh. 15). While some of these benefits are similar, their are a number of significant differences. For example, Statler did not give paid sick days and Respondent provides three paid sick days. At Respondent, if someone leaves early because they are sick, they will be paid for the remainder of the day. Such a benefit was not available at Statler.

Statler employees punched a timeclock, while employees at Respondent give their hours to the team leader who reviews and approves the timesheets for all employees on their team. Statler employees were required to park outside the mill premises while Respondent employees are permitted to park inside the mill entrance adjacent to their work areas.

Despite a number of differences in personnel policies and work procedures, Respondent Supervisor Kenneth Newman testified that Statler and Respondent are similar in a number of respects. For example, Respondent uses some of the same vendors to purchase their materials and chemicals as did Statler, the boiler house that supported Statler is used by Respondent, the paper is weighed and shipped in the same manner, the pulp is prepared by employees in the same manner, the waste treatment facility that supported Statler is used by Respondent, both Statler and Respondent maintain yard crews, and both Statler and Respondent use clamp and forklift trucks and chain falls to move and load jumbo rolls.

5. Respondent's employees

Before taking applications for employment, that began in March 1996, Respondent established its wages, hours, and working conditions and conditioned all offers of employment upon acceptance of these working conditions. Respondent retained Lewis Scott in March 1996, to develop the employee handbook and coordinate the hiring process. After applications were received from newspaper solicitation, the applicants were initially screened by Scott and if qualified were referred to the hiring managers. Thereafter, the applicants were sent to the team leaders to find out whether they thought the individuals would make good employees. The team leaders then communicated with the hiring managers or Scott to give their input into the hiring process. Scott explained to the applicants that Respondent was different from Statler and would have a new seniority system, different rates of pay, a new benefit package, and a new way of managing the organization. He told prospective employees that paper machine 3 will be staffed by four teams working a 12 hour, 3 on/3 off work schedule.

Respondent has a completely separate tax identification number, bank, bank account, telephone numbers, safety manuals, financial books, accountants, and insurance policies from those of Statler.

On June 10, Respondent started the operation of paper machine 3. Before that date, employees were involved in preparing the paper machine for operation and cleaning and painting the mill. Team Leader Danforth testified that he received no special training in the operation of paper machine 3, primarily because he and the majority of other employees previously worked on the machine while employed at Statler. Of the approximately 50 employees on board on June 10, about 34 were formerly employed by Statler and were represented by the Union. This complement of employees remained constant between June 10, 1996, and June 1997, when Respondent commenced hiring in order to support the startup of paper machine 2. Thus, at the time of the hearing, Respondent employed approximately 81 individuals including supervisors. Of these 81 employees, 23 are supervisors or administrative personnel including 10 team leaders that Respondent asserts are statutory supervisors. Of the remaining 58 production employees, about 38 were former Statler employees (Jt. Exh. 1).

6. Customers

While Statler had a larger list of customers then Respondent, Mill Manager Bob Jackson testified that a number of companies listed on Respondent's 1997 customer list were also customers of Statler during his tenure of employment from September 1993 to February 19, 1995, and April 1995 to April 10, 1995. Likewise, he verified that certain vendors on the customer list were also vendors of Statler.

7. Demand for recognition and results

On or about May 8, the Union requested that Respondent recognize it as the exclusive collective-bargaining representative and bargain with it on behalf of Respondent's production and maintenance employees. The Union's May 8 letter was not received by Respondent until May 31, and by letter dated June

11, Respondent refused to bargain with or recognize the Union as the exclusive bargaining representative of its employees. As of May 8, Respondent does not dispute that a majority of its hourly production and maintenance employees were former employees of Statler. Respondent maintains however, that the team leaders in place on May 8 and thereafter are supervisors, and should be excluded from any collective-bargaining unit that may be found appropriate.

The Union seeks to represent a bargaining unit described as follows:

> All production and maintenance employees employed at the Respondent's existing Augusta, Maine facility, but excluding office clerical employees, salesmen, professional employees, guards, and supervisors as defined in the Act.

B. Analysis and Conclusions

1. Applicable legal principles

An employer succeeds to the collective-bargaining obligations of a predecessor employer if (1) there is "substantial continuity" between the two employing enterprises; and (2) a majority of the successor's employees in an appropriate unit were also employed by the predecessor. *Capital Steel & Iron Co.,* 299 NLRB 484, 486 (1990). See also *CitiSteel USA,* 312 NLRB 815 (1993), enf. denied 53 F.3d 350 (D.C. Cir. 1995). In *Briggs Plumbingware v. NLRB,* 877 F.2d. 1282, 1285–1286 (6th Cir. 1989), the court pointed out that based on *NLRB v. Burns Security Services,* 406 U.S. 272, 280–281 (1972), and on *Fall River Dyeing Corp. v. NLRB,* 482 US. 27 (1987), the Board is required to conduct its "substantial continuity" analysis from the perspective of the employees who have been retained to determine "whether these employees . . . will understandably view their job situations as essentially unaltered." The court in *Briggs* goes on to explain that the successor determination is important because of the presumption that follows: that the union with which the predecessor bargained continues to enjoy majority status with the successor's employees. Id. at 1286.

In assessing the "substantial continuity" of the enterprise, the Board considers a number of factors: the degree of similarity in the nature of the two businesses, the extent to which the employees of the new company are performing the same jobs they did in their old jobs under the same conditions and supervisors, and the degree of similarity between the products, the production process and customers. *Fall River Dyeing,* supra. See also *Georgetown Stainless Mfg. Corp.,* 198 NLRB 234, 236 (1972), *Blitz Maintenance, Inc.,* 297 NLRB 1005, 1008 (1990).

Of all the factors bearing on successorship, perhaps the most important is a comparison of the work force of the predecessor and the alleged successor; if a majority of the latter's employees had previously been employed by the former there is usually a successorship, where the bargaining unit of the predecessor remains appropriate. See *Control Services,* 319 NLRB 1195 (1995). In *Trident Seafoods,* 318 NLRB 738 (1995), the Board stated, "a mere change in ownership should not uproot bargaining units that have enjoyed a history of collective bargaining unless the units no longer conform reasonably well to other standards of appropriateness. The party challenging a historical unit bears the burden of showing that the unit is no longer appropriate [and] the evidentiary burden is a heavy one."

2. Factual findings regarding successorship

a. The appropriateness of the Union's demand for recognition

Respondent contends that because the Union's May 8 letter demanding recognition was authored by the International Union, and the parties' CBA recognizes the signatory locals as the sole collective-bargaining agent for the employees, the demand for recognition is inappropriate and relieves the Respondent from any obligation to bargain with or recognize the Union.

The first CBA covering the period from September 1, 1968, to August 31, 1971 (G.C. Exh. 15), shows that the United Papermakers and Paperworkers, AFL–CIO and its Local No. 84, and the International Brotherhood of Pulp, Sulphite and Papermill Workers, AFL–CIO and its Augusta Local No. 57, were recognized by Statler as the sole collective-bargaining agent for its employees. Thereafter, in or around 1972, the two International Unions merged and formed the United Paperworkers International Union. Local No. 84 changed its number to Local 82 but the two local unions did not agree to merge and continued as independent local unions representing their respective Statler production and maintenance employees. In the next CBA introduced in evidence covering the period from September 1, 1975, to August 31, 1977, the cover page reads: "Labor Agreement" between Statler tissue division of Statler Industries and the United Paperworkers International Union, AFL–CIO–CLC, and its Augusta Locals 82 and 57. (G.C. Exh. 14.) The preamble states that, "this agreement is made by and between the Augusta plant of Statler Tissue Div. of Statler Industries and the United Paperworkers International Union, AFL–CIO–CLC and its Augusta Locals No. 82 and 57." The CBA is signed by representatives of the International Union and the Locals. In article 2, recognition, it states in pertinent part: "The Company recognizes the signatory Locals as the sole collective bargaining agent for its employees in the work which properly comes under its jurisdiction."

During the period of time that the 1975 CBA was in effect, the Board issued on August 25, 1976, a certification of representative in Case 1–RC–14,604, to the United Paperworkers International Union, AFL–CIO (G.C. Exh. 16). That certification covered the pulp preparation quality control technicians, paper testers, and paper inspectors employed at Statler's Augusta, Maine Mill. In each of the subsequent CBA through 1994 (G.C. Exhs. 2, 10, 11, 12, and 13), the parties' "Labor Agreement" and "Preamble" language includes Statler and the United Paperworkers International Union, AFL–CIO–CLC and its Augusta Locals No. 82 and No. 57 and the CBA are signed by the International Union and the Locals. Likewise, the language contained in article 2, recognition, in each of the CBA shows that Statler agrees to recognize the signatory Locals as the sole collective-bargaining agent for its employees in the work which properly comes under its jurisdiction including those employees as certified in NLRB Case 1–RC–14,604.

While I understand the argument advanced by Respondent that the recognition clause in the CBA designates the signatory Locals as the sole collective-bargaining agent for Statler employees, and the subject demand for recognition was initiated by the International Union, I am not persuaded that this undermines the Union's May 8 demand for recognition.

First, I note that the "Labor Agreement" and "Preamble" language contained in each of the former CBA shows that the agreement is made between Statler and the United Paperworkers International Union, AFL–CIO–CLC and its Augusta Lo-

cals No. 82 and No 57 and the International Union signed each of the CBA. Second, article 4 in each of the former CBA entitled "Adjustment of Disputes," contains provisions that provide for the International Union to be specifically involved in settlement discussions at the last step of the grievance procedure prior to the matter being referred to arbitration. Thus, it is evident, that Statler recognized the International Union as a party to the CBA. Moreover, International Union Representatives William Carver and Raymond Hinckley credibly testified that the International Union fully participated in consecutive collective-bargaining negotiations with Statler representatives since 1975, and at all times served as the chief union spokesperson. This was confirmed by Respondent Mill Manager Bob Jackson and Respondent witness Craig Gray, who previously served as president of Local 57. Additionally, Statler representatives directly contacted the International Union to request a freeze in a negotiated wage increase for 1 year and informed the International Union that it was planning on building a waste treatment plant in advance of negotiations over the wages and hours of employees to be assigned to that facility. Third, in 1976, the Board certified the International Union as the exclusive collective-bargaining representative for the pulp preparation quality control technicians, paper testers, and paper inspectors employed at Statler and this certification is found in the recognition clause for each of the parties' successive CBA through 1994.

Considering the forgoing, and particularly noting the 1976 Board certification of the International Union and the admission of Respondent witnesses that the International Union fully participated in the administration of the CBA and consecutive contract negotiations since 1975, I find that despite the language recognizing the signatory Locals as the sole collective-bargaining agent, a longstanding past practice developed between the parties which establishes that the International Union is the employees collective-bargaining agent. Thus, I find that the evidence conclusively establishes that Statler consistently recognized the International Union as the exclusive collective-bargaining representative of its production and maintenance employees. Therefore, I reject the Respondent's argument that the May 8 demand for recognition is not appropriate, privileging its refusal to recognize and negotiate with the Union over the employees terms and conditions of employment.[6] See *Vermont Marble Co.,* 301 NLRB 103 (1991).

b. The issue of substantial continuity

The factors to look to in determining where there is substantial continuity were summarized by the Supreme Court in *Fall River,* supra*,* as follows:

> [W]hether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and has basically the same body of customers.
>
> These factors are to be assessed primarily from the perspective of the employees. Thus, the question is "whether those employees who have been retained will view their job situations as essentially unaltered."

Respondent contends that it is not a successor because its business, after the purchase of assets from Statler, is entirely different in that it does not convert jumbo rolls of paper into consumer products. Contrary to this contention, I find that there is "substantial continuity" between the Statler operation and Respondent's.

First, it is apparent that Respondent is still in the same place performing the same basic operation as under Statler. Indeed, Respondent employees continue to make jumbo rolls of paper on the same paper machine previously used to produce those rolls at Statler. From the inception of Respondent's startup of paper machine 3 on June 10, it continued to produce 40-inch jumbo rolls of paper with some of the same workers previously employed at Statler. This continued uninterrupted until May 1997, when Respondent upgraded paper machine 3 to produce 60-inch jumbo rolls of paper but still retained the capability to produce 40-inch rolls of paper and did so for certain customers. Thus, for approximately a 1-year period, the same jumbo rolls using some of the same employees were produced on the identical machine used by Statler.

Where a new employer "uses substantially the same facilities and work force to produce the same basic products for essentially the same customers in the same geographic area," it will be regarded as a successor. *Valley Nitrogen Products,* 207 NLRB 208 (1973). This proposition is in no way undermined by the upgrading of paper machine 3. In this regard, the installation of the horizontal arm reel winder together with a bridge crane to make 60-inch jumbo rolls and the construction of an additional truck loading dock and warehouse was not completed until May 1997, a period approximately 1 year after the Union's demand for recognition. Therefore, I find from the employees perspective, Respondent was operating for a 1-year period substantially the same business enterprise as Statler. Other factors also support this conclusion.

First, while I note that there was a 1-year hiatus from the close of Statler's mill until the purchase of those assets by Respondent on April 11, paper machine 3 was fully operational 2 months later on June 10. Thus, unlike the court of appeals holding in *CitiSteel USA,* supra*,* that found a 2-year hiatus in production coupled with the transformation of a low-volume specialty steel mill into a high volume minimill defeated successorship, operations here commenced within 2 months of purchase and the mill continued to make jumbo rolls of paper on the same paper machine used by the predecessor.

Second, I find that while Respondent's employees began performing low level maintenance on paper machine 3 that previously had been done by Statler employees in another department, such maintenance assignments did not significantly alter employees' job duties. Further, while the Respondent assigned employees the new task of identifying problems and participation in team meetings to propose alternatives to mitigate problems, there is no indication that this interfered with their normal work duties. Accordingly, even if Respondent made changes to employees' jobs after it started operations, which occurred after the Union had demanded recognition, I would find that such changes were not so great as to sever the substantial continuity between the Respondent's operation and that of Statler.

[6] I make this finding despite Respondent's reliance on the case of *Newell Porcelain Co.,* 307 NLRB 877 (1992), affd. *Electrical Workers UE v. NLRB,* 986 F.2d 70 (4th Cir. 1993). In that case, unlike here, the union representative did not make clear to the employer who was the appropriate collective-bargaining representative. Thus, the Board and the court of appeals found that in the absence of a valid demand for recognition and bargaining, a violation of the Act cannot be found.

Third, I find that as of May 8, a majority of Respondent's production unit was employed by the predecessor. Moreover, even with the increased hiring undertaken in June and July 1997 to support the startup of paper machine 2, the record still establishes that a majority of Respondent's production unit was previously employed by Statler.

The complement of supervisors also supports successorship. In this regard, even before the Bankruptcy Court approved the sale of Statler's assets, Respondent's president, Posner, met with and subsequently hired Bob Jackson, William Perry, and Brad Snow, all of whom held high-level positions at Statler. Significantly, Bob Jackson held the position of paper mill manager at Statler and was hired as mill manager for Respondent. Thus, he knew and previously supervised the majority of the production employees who were hired on or before June 10, and continue to work on Respondent's paper machine 3. Soon thereafter, Respondent hired Richard McElhaney and Kenneth Newman to its supervisory complement, both of whom held managerial positions at Statler.

In summary, I find that the hiatus between the purchase of the assets and start up of the mill was minimal, the location remained the same, a number of the high-level supervisors remained the same, a number of customers and vendors remained substantially the same, and finally, while the scale of Respondent's business and the products produced have been reduced from those which existed under Statler, the method of production of the jumbo rolls of tissue paper has remained essentially the same.

In light of the above, I find that Respondent is a successor to Statler, because the facts reflect "substantial continuity" between Respondent and Statler.

I further find that by failing to recognize and to bargain with the Union, Respondent has violated Section 8(a)(1) and (5) of the Act.[7]

3. The team leader issue

The Respondent takes the position that the team leader positions possess supervisory indicia and should be excluded from any collective-bargaining unit found to be appropriate herein.

Contrary to this argument, the General Counsel and the Union assert that Respondent's team leaders do not possess supervisory indicia and should be included in any appropriate collective-bargaining unit.

Respondent's human resource manager, Reiko Bennett, credibly testified that team leaders are involved in the hiring process. First, the core hiring team reviews the applications and conducts the initial applicant interviews. Thereafter, the team leaders meet with the applicants and give their recommendations to the core hiring team whether they think the applicants will make good employees. On occasions, after the interview, team leaders have recommended to the core hiring team not to hire an applicant and those recommendations have been followed. Bennett also testified that Respondent regularly has 1 hour weekly supervisory staff meetings and shift team leaders on duty must attend those meetings.

Respondent has two types of written discipline. The first consists of a verbal warning which is documented and the second step is a written reprimand. Bennett's signature must appear on both forms and the team leader must discuss the discipline with her before she signs the form. In the case of a verbal warning, Bennett signs the form after the document is given to the employee by the team leader. Team Leader Ted Danforth credibly testified that he recommended to Bennett that employee Benjamin Sack not be permitted to transfer to a day job and that this recommendation was followed. Likewise, Danforth on August 26, gave a written reprimand to employee Jeffrey Deschaine to document prior verbal warnings regarding unsafe work habits, inappropriate behavior and attitude, and paper quality issues. In this warning, Danforth notes that after discussions with the mill manager and the human resources manager, it was decided to extend his probationary period another 90 days (R. Exh. 8). Additionally, Danforth recommended to Supervisor Kenneth Newman that an employee receive 3 days off and he agreed with the recommendation.

Danforth also testified that he interviews prospective applicants for employment, is paid a higher hourly wage then members of his team and reviews and approves the weekly timesheets of all employees on the team. Danforth leads team meetings regarding safety and how to improve performance and has used his authority to let employees go home early. Team Leader Claude Richard credibly testified that he interviews prospective applicants for his yard team and then apprises the core hiring team whether he can use those applicants. Richard also conducts safety meetings and has met with a number of employees in his office to discuss safety issues. He documents these meetings and retains those notes in the employee's personnel file. Richard testified that he has the authority to let employees go home early and has exercised that authority. In this regard, Richard delegated certain responsibilities to an employee during a planned absence from the mill. The employee completed those duties in an exemplary manner and Richard gave the employee several hours off as a reward. Richard also reviews the hours worked for each of his team members and signs the weekly employee timesheets. Lastly, Richard credibly testified that he has the sole authority to assign and prioritize work for the yard crew. In this regard he must independently decide, among the numerous requests received for services of the yard crew, the priority for making and completing those work assignments.

Mill Manager Jackson credibly testified that the team leader in the pulp section can and has independently scheduled overtime for his team members.

Although Danforth and Richard testified that they normally work alongside their team members, the above testimony conclusively establishes that Respondent's team leaders exercise independent judgment rather then just making routine decisions. In this regard, team leaders effectively participate in the hiring process and recommend whether applicants should or should not be hired, they prepare and give written warnings to employees and can recommend more severe discipline, they are paid more then other team members, they review and sign employee timesheets, they can authorize employees time off, and they independently schedule overtime and attend weekly supervisory staff meetings.

[7] I make this finding despite Respondent's contention that the Bankruptcy Court determined that "[b]y acquiring the Assets, Tree-Free shall not be deemed to be a successor in interest to the Debtor, nor shall Tree-Free be deemed to assume any liabilities or obligations of the Debtor.'' (R. Exh. 4, par. 7.) In this regard, I conclude that the successor bargaining obligation incurred by Respondent is not a claim or debt that is dischargeable by a Bankruptcy Court or can be binding on the Board. See *Golden State Bottling Co. v. NLRB,* 414 U.S. 168, 184 (1973), and 11 U.S.C. § 101 (5) and (12).

Under these circumstances, I find that Respondent's team leaders are 2(11) supervisors under the Act and must be excluded from the below noted appropriate collective-bargaining unit. *K.B.I. Security Services,* 318 NLRB 268 (1995).

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent is a successor employer to Statler.

4. Respondent's team leaders are supervisors within the meaning of Section 2(11) of the Act and must be excluded from the unit set forth below.

5. Since May 8, the Union has been the exclusive collective-bargaining representative of Respondent's employees in the following unit:

> All production and maintenance employees employed at Respondent's existing Augusta, Maine facility, but excluding office clerical employees, salesmen, professional employees, guards and supervisors as defined in the Act.

6. Since May 8, Respondent has failed and refused to recognize and bargain with the Union in the unit set forth above, in violation of Section 8(a)(1) and (5) of the Act.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The Respondent, Tree-Free Fiber Co., Limited Liability Company, Augusta, Maine, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain collectively with the Union as the exclusive bargaining representative of its employees in the appropriate unit set forth below:

> All production and maintenance employees employed at Respondent's existing Augusta, Maine facility, but excluding office clerical employees salesman, professional employees, guards and supervisors as defined in the Act

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

(2). Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and upon request bargain with the United Paperworkers International Union, AFL–CIO–CLC, and its Locals 57 and 82 as the exclusive collective-bargaining representative of the employees employed in the unit described above.

(b) Within 14 days after service by the Region, post at its facility copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 26, 1996.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail or refuse to recognize and bargain with United Paperworkers International Union, AFL–CIO–CLC, and its Locals 57 and 82 as the exclusive collective-bargaining representative of the employees in the following appropriate unit with regard to wages, hours, working conditions, and other terms and conditions of employment:

> All production and maintenance employees employed at our existing Augusta, Maine facility, but excluding office clerical employees, salesmen, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, recognize and bargain collectively with United Paperworkers International Union, AFL–CIO–CLC, and its Locals 57 and 82 as the exclusive bargaining representative of the employees in the appropriate unit described above, with regard to their wages, hours, working conditions, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

TREE-FREE FIBER CO., LIMITED LIABILITY COMPANY

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."